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Supreme Court, U.S.
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Record No. 96-1878

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

OMNI HOMES, INC.
Petitioner,

vs.

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHARON E. PANDAK
County Attorney
STEPHEN A. MacISAAC
Deputy County Attorney
GIFFORD R. HAMPSHIRE*
Assistant County Attorney
*Counsel of Record
One County Complex Court
Prince William, Virginia 22192
Counsel for Respondent
(703) 792-6620

36 pp

QUESTIONS PRESENTED

1. Does this Court have jurisdiction to grant a Writ of Certiorari to consider a "regulatory partial taking" theory that was neither raised nor addressed below?

2. Does this Court have jurisdiction to grant a Writ of Certiorari to render an advisory decision reversing its rulings that there is no such thing as a "regulatory partial taking"?

3. Should this Court exercise its discretion to grant a Writ of Certiorari solely to consider whether the Supreme Court of Virginia misapplied the reasonable investment-backed expectation rule, which rule the Supreme Court of Virginia stated correctly below?

4. Should this Court exercise its discretion to grant a writ of certiorari when the decision of the Supreme Court of Virginia does not conflict with this Court, another state court of last resort or a United States court of appeals?

5. Was the Supreme Court of Virginia plainly wrong in rejecting Omni's regulatory taking claim where Omni was not deprived of any land use interest in its property?

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Omni's statement of the opinions below omits citation to unofficial reports in contradiction of Rule 14(1)(d). The full citation, including the unofficial report, is *Board of County Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460 (1997) (Record No. 960508).

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). Omni's first two Questions Presented are based on a legal theory never presented to or addressed by the Virginia courts. Further, Omni's failure to prove that County regulation deprived it of *even one* land use interest in its property renders advisory any decision on Omni's first two Questions Presented. Omni's third Question Presented also does not state a basis for this Court's discretionary exercise of jurisdiction under Rule 10; it asks only whether the Supreme Court of Virginia's decision was erroneous or misapplied the properly-stated, "reasonable investment-backed expectation" prong of the ad hoc, regulatory taking analysis.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This was a regulatory taking case under the Just Compensation Clause of the Fifth Amendment.[1] The issue was whether the County violated that clause by purchasing land in which Omni *did not* possess a property or contract right. The trial court held that the County's purchase of this separate and separately-owned property constituted a regulatory taking of Omni's property. The Supreme Court of Virginia reversed, concluding that "the facts do not support a finding of a compensable taking or damage under either the federal or state constitutions." A-35[2] (253 Va. at 66, 481 S.E.2d at 463).

In this case, the alleged land use interest was Omni's desire to develop its property ("Doves Landing") as an R-10

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[1] In its statement of the case, Omni refers to claims of due process and equal protection; however, Omni elected not to pursue those claims at trial and the trial court's lengthy bench ruling contains no analysis or conclusions of law as to them. *See* A-2 through A-33. Omni noted no exception to this omission and did not appeal any failure of the trial court of declare violations of due process or equal protection. The only Constitutional claim at issue was whether there was a regulatory taking under the Just Compensation Clause of the Fifth Amendment. A-14; A-35, A-40 (253 Va. 63, 66, 481 S.E.2d 461, 463).

[2] The citation "A-__" is to the appendix attached to Omni's Petition.

subdivision[3] in conjunction with the adjacent property. Omni elected to pursue this sort of development instead of developing its property independently.[4] Omni also elected to design its development with public road access needed for R-10 development coming through the adjacent property ("Doves Overlook") instead of upgrading the existing public road ("Doves Lane"). The trial court held that, given this dependency, the County took Doves Landing by regulation when it purchased Doves Overlook. A-31 through A-32. Curiously, admissions at trial established that Omni never even *asked* the County to grant it easements for water, sewer and roads across Doves Overlook from the time the County became the owner of Doves Overlook. JA[5] 1504 A-C, 1505-

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[3] R-10 development refers to single-family residential development at a maximum density of four (4) units to the acre.

[4] Both the trial court and the Supreme Court of Virginia found that Omni had alternative, economically-viable uses available to it at the time it purchased Doves Landing. A-9, A-43. The Supreme Court of Virginia held that the trial court erroneously discounted these alternative uses based on the money Omni had spent in pursuit of unsecured joint R-10 development with Doves Overlook by the time the County purchased Doves Overlook. A-42 through A-43 (253 Va. at 68, 481 S.E.2d at 464).

[5] The Joint Appendix used below will be cited herein as "JA___". Respondent understands that the Joint Appendix is not before the Court now, but includes these references in the event the Court is inclined to address any of the discrepancies in factual statements.

08, 2693-98, Admissions 1, 3, 12. In any event, the Supreme Court of Virginia reversed, holding that not securing the needed road and utility access was "a *risk* which Omni was aware of and accepted when it purchased Doves Landing." A-44 (253 Va. at 69, 481 S.E.2d at 465). (Emphasis in original).

Omni's Statement of the Case is mostly erroneous. It mischaracterizes the trial court's findings and the evidence, and it does so without reference to the Joint Appendix used below. In the way of correction, the County incorporates in this Statement of the Case the facts set forth in the opinion below[6] and urges the Court to adopt them in lieu of those alleged in Omni's Petition. The County directs the Court's specific attention to pages A-36 through A-37[7], where the Supreme Court of Virginia observed that:

(1) Omni needed to secure road and utility access before it could develop its property as an R-10 development;

(2) Omni had more than one alternative in securing that access;

(3) Omni "decided to base its R-10 development plan on providing road, sewer and water access through and in conjunction with Doves Overlook and its owner"; and

(4) Omni did not possess either a written agreement[8] or "any easements or other property interests in Doves Overlook that

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[6] A-35 through A-38 (253 Va. 63-64, 481 S.E.2d 461-62).

[7] 253 Va. at 63, 481 S.E.2d at 461-62.

[8] The trial court found that "Omni clearly did not have a contract right to use Doves Landing through Doves Overlook, nor could it compel DLA [the owner of Doves Overlook] to grant any such right." A-5.

would permit it to construct the infrastructure through Doves Overlook."

As found by the trial court, R-10 development in conjunction with Doves Overlook was "always conditional because it was conditioned on the owner of Doves Overlook obtaining prior approval for that property, and in fact, agreeing to the cost sharing scheme and on meeting the usual requirements of subdivision development found in the County Ordinances as authorized by Virginia Code Section 15.1-465, et seq." A-7. It is incorrect for Omni to state, therefore, that the County's purchase of Doves Overlook deprived Omni of a land use *right* to so develop Doves Landing in the R-10 zoning district. That land use interest was always dependent upon DLA's good graces and cooperation of the owner of Doves Overlook ("DLA"), *not upon any County permit.*

It is also incorrect for Omni to say, as it does on page 3 of the Petition, that the trial court found a "multitude of sins" to have caused a compensable regulatory taking of Doves Landing. The trial court never used Omni's self-serving term. *See* A-2 through A-33. Further, the trial court specifically found that there were only two types of regulatory conduct at issue, one being "delay in the development process for Doves Landing" and the other being "the purchase of Doves Overlook by the County." A-23. Of these two types of putative regulation[9], the trial court found causative *only* the County's purchase of Doves Overlook; in the same breath, the

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[9] The County appealed the trial court's finding that the purchase of one parcel of property constituted regulation of another. This question was not reached below. *See* A-51, n. 5 (253 Va. at 73, n. 5, 481 S.E.2d at 467, n. 5).

trial court found that delay in the development process for Doves Landing did *not* deprive Omni of the right it alleged to have lost. A-26. *See also* A-31.

Omni's Statement of the Case also omits the other findings of the trial court concerning delay in subdivision plan approval, namely:
(1) that "many of the actions of the County involved legitimate concerns"[10];
(2) that "Omni too was responsible for some the delay in the process. . .[b]ecause Omni had elected on its own to submit a plan that was dependent on the development of Doves Overlook . . ."[11]; and
(3) at the time Omni went to settlement on Doves Landing "neither the preliminary plan for Doves Overlook, nor the preliminary plan for Doves Landing had been approved by the

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[10] A-12. The trial court continued that "some were in violation of the law; as the parties learned in the litigation that ensued as the owners tried to force the County not to impede the plan approval process." The evidence in this regard, however, related to the County's contention that a proposed three-mile extension of public water and sewer required a review under Virginia Code Ann. § 15.1-456. *See* A-37. While hindsight now shows that the County did not prevail on this position, there was no evidence that it was unreasonable or sanctionable. Indeed, both Omni and DLA recognized the legitimacy of the dispute by entering into consent decrees placing plan approval on hold while the issue was resolved through the appellate process. *See* A-37. The trial court found that the parties had so agreed. A-13.

[11] A-12.

County...; Omni still had no written or enforceable cost sharing agreements."[12]

On page 5 of the Petition, Omni intimates that the purchase of Doves Overlook was part of a County effort to arrest the proposed Doves Landing development. Omni fails, however, to point to evidence to support this claim sounding in conspiracy and tort. Indeed, this assertion contradicts Omni's contention at trial that there was no such conspiracy and the trial court's observation that this was not a tort case. JA 2025-27, 2047. In any event, there was no *evidence* linking the various disparate, facially-neutral events to a supposed effort to block development of Doves Landing. The only suggestion in this regard came from argument of Omni's counsel.

On page 4 of the Petition, Omni erroneously states that "the properties were targeted in the County's 'Stale Zoning Report'" (hereinafter, the "Report"). The trial court made no such factual finding and there was no evidence showing Doves Landing to have been singled out for adverse treatment. Doves Landing was one of a large number of undeveloped properties the Report indexed as having old zoning that had become inconsistent with the County Comprehensive Plan. JA 2245-47, 2332. When included in the 1987 revision of the Report, Doves Landing and Doves Overlook were among twenty-four properties added since the March 1987 version. JA 2332. The only testimony was that the Report was neither adopted nor implemented through the subdivision review process. JA 1210-11. In addition, the Report contained *no* recommendations as to Doves Overlook,

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12 A-13.

Doves Landing or *any* of the other numerous properties listed therein. The Report only outlined a number of alternatives that the Board of Supervisors might, but did not, consider. JA 2260-61.

Omni states, further, that a memorandum from the County Attorney contained a "plan of action to illegally stop [Doves Overlook and Doves Landing]." Pet. 4. That memorandum, however, contains no mention of the Doves Landing property and was issued in the context of the Virginia Code Ann. § 15.1-456 dispute discussed in the opinion below. A-37[13]. Far from being an illegal plan to stop Doves Overlook or Doves Landing, the memorandum only reflected agreement with the Zoning Administrator's conclusion that a Va. Code Ann. § 15.1-456 review would be needed for *Doves Overlook* and that public utilities could not be extended to *Doves Overlook* "for valid legal reasons." JA 2381. The County Attorney was even cautious to note that:

> Nor do I believe that refusal to process this plan will result in any liability under developing case law regarding regulatory takings. The property may yet be lawfully used at one acre density under the ordinance provisions cited above. Thus, valuable use remains in the land, and that precludes a taking.[14]

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13 253 Va. at 64, 481 S.E.2d at 462.

14 It is important to note that Omni did not complain below that it was deprived of the right to develop on public water and sewer once the Va. Code Ann. § 15.1-456 issue was resolved in January of 1990. *See* A-37 (253 Va. at 64, 481

JA 2381. While the former County Attorney's legal interpretation on the need for a Va. Code Ann. § 15.1-456 review ultimately did not prevail, it does not follow that it was part of a illegal plan to stop Doves Overlook and Doves Landing by any means possible. It was, rather, a legal and land use planning issue about which lawyers, planners and developers could, and did, legitimately disagree.

Omni also claims that the County's "Sewer in the Green" policy was part of a plan directed specifically at Doves Landing and Doves Overlook. Pet 3. The evidence showed, however, that water and sewer lines were not allowed in *any* of the areas planned for "agricultural", "resource management" or "rural residential" uses, and colored various shades of green on the Comprehensive Plan. JA 1321-22. This land use planning policy was of County-wide application. *Id.*

Omni also claims that the Chesapeake Bay Preservation Act[15] was partly responsible for a regulatory taking of Doves Landing. Pet 5. The evidence at trial established, however, that Doves Landing was not in any way

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S.E.2d at 462). It complained, rather, that it could not extend those facilities (and an access road) through Doves Overlook at a time of its choosing and share the cost with the owner of Doves Overlook. Again, it elected the Doves Overlook route over an upgraded Doves Lane but never entered into an agreement securing that route. *See* p. 4, herein.

[15] Va. Code Ann. § 10.1-2100, *et seq.*

impacted by this law. JA 1343-45, 1799. Therefore, the Chesapeake Bay Preservation Act was of no relevance at trial.

Omni asserts that County improperly required "an approved road bond in the preliminary plan stage rather than at the final plan stage." Pet. 5. However, the evidence at trial established, as a well-known and customary prerequisite for submission to the Prince William County Planning Commission, the requirement that a preliminary development plan show subdivision access to a state-maintained road. JA 1192-94, 1196-98, 1200-05. As stated above, Omni *chose* to make its planned development dependent upon Doves Overlook for that access instead of showing access through an upgraded Doves Lane. *See*, p.4, herein. DLA never submitted the requisite, bonded road plan for Doves Overlook that Omni needed to move its Doves Landing development plan forward to the Planning Commission. JA 1309. As found by the trial court, Omni had no legal means to compel DLA to do so. A-5.

The other adverse consequence to Omni of electing to make its development dependent upon Doves Overlook was that it had no choice but to *hope* that DLA would submit a final subdivision plan for Doves Overlook before November 27, 1990, in order that Doves Overlook would be vested and thus avoid compliance with the Commonwealth of Virginia's Chesapeake Bay Preservation Act regulations, as provided by the County's vesting guidelines. JA 2732. Unfortunately for Omni, DLA did not submit a final plan before that date, although its preliminary plan approval date (February 7, 1990) accorded it almost ten (10) months to do so. DLA did not even *seek* a County determination that it was vested from complying with the Chesapeake Bay Preservation Act until approximately six (6) months after that Act was effective. JA

1521. Worse for Omni, DLA did not pursue an appeal of the ensuing adverse vesting determination, electing instead to submit to regulation by filing the required "Preservation Area Site Assessment" (PASA) study in summer of 1991. JA 1521-22. The PASA was approved in December 1991 and DLA submitted its first final subdivision plan for Doves Overlook in January, 1992. JA 1510-11, 1839. Even when submitted, that plan *did not* show the bonded road access Omni needed to move its preliminary subdivision plan for Doves Landing forward. JA 1510-11, 1839, 2937.

Omni also misrepresents that "Supervisor Becker, in fact, testified that depriving Omni of the ability to use its property as planned, at no apparent additional cost to the County, was one of the known and understood benefits to the County of the settlement of the DLA lawsuit." Pet. 6. Omni refers to a surreal episode in which the trial court allowed Supervisor Becker to be questioned adversely, and over exception, as to whether the motives of members of the Board of County Supervisors in settling a previous lawsuit were consistent with a letter from DLA's counsel proposing settlement.[16] The trial court allowed this questioning *only* for the purpose of showing the County's *knowledge* at the time of

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[16] This settlement proposal was written on behalf of DLA (not the County) by the very lawyer that questioned Becker (also Omni's counsel in this case) and *more than a year before the settlement*. JA 1415-23. Under Virginia law, moreover, the motives of members of a county board of supervisors in voting for or against an official act (such as the settlement of a lawsuit) are not relevant and may not be inquired into. *See* Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948).

settlement. JA 1419. Supervisor Becker's testimony, moreover, was devoid of any reference to Omni or a goal of depriving anyone of "the ability to use its property as planned." More strange is that Supervisor Becker testified repeatedly that the goal of buying Doves Overlook was to settle a lawsuit and that he did not even know the route Omni planned to take with water and sewer lines. JA 1415-17. In response to the trial court's inquiry, he specifically denied that the County purchased Doves Overlook for the purpose of blocking development on Doves Landing. JA 1404. Thus the evidence established *only* that Doves Overlook was purchased as part of a settlement of a separate inverse condemnation lawsuit that was based, in part, on the impact of the Chesapeake Bay Preservation Act. (Va. Code Ann. § 10.1-2100-2116).[17] The Supreme Court of Virginia recognized this in its opinion. A-38 (253 Va. at 64, 481 S.E.2d at 462).

Omni's claim that the County deprived it of joint R-10 development by purchasing Doves Overlook is belied by Omni's admissions that it did not even *ask* the County to agree to arrangements for such development after the County purchased Doves Overlook. JA 1504 A-C, 1505-08, 2693-97. It is also contradicted by Omni's admission at trial that it did not even *ask* the County to grant it easements for the water, sewer and road easements across the Doves Overlook property. *Id.* Admission 12. More important, neither the trial court nor Omni cited law that imposed on the County the

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[17] Again, the evidence at trial established that, unlike Doves Overlook, Doves Landing was not impacted by the Chesapeake Bay Preservation Act. *See* p. 9, herein.

Constitutional obligation to use its legally-acquired property[18] in a way that most benefited Omni. Hence the irrelevance of the trial court's finding that "since its purchase of Doves Overlook, the County has taken no action whatsoever to use or develop Doves Overlook in any manner including as an R-10 Subdivision. . .or to build the planned roads, water and/or sewer systems." Pet. 6, A-14.

For the reasons stated above, Omni's statement of the case is not accurate. This Court should adopt the statement of case and facts set forth in the opinion below instead. It should also evaluate Omni's specific factual claims in light of the corrections set forth herein.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO CONSIDER THE QUESTIONS PRESENTED BY OMNI'S PETITION

A. SO-CALLED "REGULATORY PARTIAL TAKING" THEORY WAS NEITHER RAISED NOR ADDRESSED BELOW

This Court wisely refuses to review judgments rendered by a state court of last resort unless a federal question has been raised or decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing

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[18] Neither Omni nor the trial court questioned the validity of the County's purchase of Doves Overlook pursuant to Va. Code Ann. § 15.1-262. A-24, A-26 through A-27.

judgments of state courts under 28 U.S.C. § 1257, the Court will refuse to consider claims that were not raised or addressed below) *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court).

In its Petition, Omni suggests jurisdiction by this Court by continuing to mislabel both its claim and the trial court's ruling as "regulatory partial taking."[19] As noted by the Supreme Court Virginia,[20] however, Omni only argued that it suffered a taking of a denominator consisting of the *entire fee* of Doves Landing. Omni asserted that the regulatory taking of its *fee* could be determined by either: (1) the categorical

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[19] This Court has repeatedly rejected that there is such a thing as a partial regulatory taking. To the extent this Court has discussed the issue, it has mused about denominators consisting of something less than the fee. *See Lucas v. South Carolina Coastal Council*, 505 U.S. at 1016 n. 7. These musings, however, directly conflict with the long-standing precedent of this Court, *reaffirmed subsequent to Lucas*, that the denominator is the parcel as a whole (*e.g.* all sticks in the bundle of rights) *See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, (1993) *citing Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and *Keystone Bituminous Coal Assn. v. DeBeneditis*, 480 U.S. 470 (1987). Therefore, there is no important federal question as to whether there is such a thing as a "partial regulatory taking". This Court has already decided there is not. *See* p. 27, herein.

[20] A-50 & n. 4; (253 Va. at 71& n. 4; 481 S.E.2d at 467 & n. 4).

method first announced by this Court in the *Lucas v. South Carolina Coastal Council*[21] or (2) by the three-part, *ad hoc method* endorsed by this Court before and after *Lucas.*[22] Omni's statement of the case here also contradicts Omni's current claim that a partial regulatory taking theory was at issue. It accurately characterizes the trial court's ruling as a finding that County regulation "went too far by denying Omni all economic and viable use of *its property*. . . ." Pet. 3. *See also* A-3. (emphasis added). The failure of both Omni and the lower courts to address Omni's regulatory taking claim based on any less of a denominator than the entire fee of Doves Landing places this case outside this Court's purview. *See Yee v. City of Escondido,* 503 U.S. at 523-33. Omni cannot circumvent this jurisdictional defect by its continued mislabeling, as a "regulatory partial taking", an alleged loss of value in the entire bundle of rights. To the extent this Court has discussed the issue in footnote dictum and dissenting opinions it has only been as a total taking of something less than the fee. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016 n. 7; *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138-153 (1978) (Rehnquist, J., *dissenting*); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 506-21 (1986) (Rehnquist, C. J., *dissenting*).

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[21] 505 U.S. 1000 (1992).

[22] Both Omni and the trial court occasionally confused the term "partial taking" with Omni's alternative argument that it suffered a taking of *all* economically-viable uses in the *whole* of Doves Landing, but as measured by the pre-*Lucas,* ad hoc analysis (as opposed to the categorical test first announced by this Court in *Lucas.*) *See* A-25. Omni continues to exhibit that confusion here. *See* Pet. 11-12.

B. THERE IS NO CASE OR CONTROVERSY INVOLVING THE CONCEPT OF A SO-CALLED "PARTIAL REGULATORY TAKING"

A basic requirement for review in this Court is that there be an actual case and controversy involving the issues presented for review. *See e.g. Golden v. Zwickler*, 394 U.S. 103 (1969). This Court does not render purely advisory decisions; a petitioner must have an immediate, legal interest in the outcome of the decision. *Id.* In this case, Omni would not be any more entitled to compensation if this Court were to reverse its prior rulings and declare that there is such a thing as a "regulatory partial taking." This is because Omni failed to prove that County regulation deprived it of *even one* land use interest in Doves Landing.

Omni claimed that it lost the right "to develop Doves Landing as an R-10 development in conjunction with Doves Overlook for water, sewer and road access." Pet. 4. Both courts below, however, found that this right was never a stick in the "bundle of rights" of Doves Landing in the first place. A-5 through A-6; A-49 (253 Va. at 71, 481 S.E.2d at 467). Omni had no more than a "unilateral expectation or abstract need" to this preferred method of development. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 165 (1980); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994). Under the proper analysis set down by this Court, the Constitution does not require compensation if, as here, "the proscribed use interests were not part of [the owner's] title to begin with." *Lucas* 505 U.S. at 1027. *See also M & J Coal v. United States*, 47 F.3d 1148 (Fed. Cir. 1995); *Hage v. United States*, 35 Fed.Cl. 147 (1996). Omni would not have been entitled to Fifth Amendment

compensation for the loss of this non-existent land use interest, even if Omni *had* asserted it as the entire denominator. Omni, therefore, has no immediate, legal interest in any declaration that there is such a thing as a "regulatory partial taking" and its first and second Questions Presented should be dismissed because they ask this Court to render an advisory decision.

C. OMNI'S THIRD QUESTION PRESENTED DOES NOT STATE A BASIS UPON WHICH THIS COURT SHOULD EXERCISE DISCRETION TO GRANT A WRIT OF CERTIORARI

Pursuant to Rule 10, this Court does not normally grant a writ of certiorari when the asserted error consists of the misapplication of a properly stated rule of law. Omni's third Question Presented falls squarely into this camp. *See* Pet. i, Question Presented # 3. In the corresponding argument, Omni agrees with the Supreme Court of Virginia's summation of the reasonable investment-backed expectation rule: that property owners must "demonstrate that they bought their property in reliance upon a state of affairs that *did not include the challenged regulatory regime*." Pet. 18. (emphasis in original) *Compare* A-43 through A-44 (253 Va. at 68, 481 S.E.2d at 465). Omni takes issue only with the Virginia court's *application* of that rule to conclude that Omni did not possess such expectations.

The Supreme Court of Virginia applied the rule to conclude that the requirement for road and utility access was part of the "state of affairs" upon which Omni relied when it purchased Doves Landing." A-44 through A-46 (253 Va. at 69-70, 481 S.E.2d at 465-66). Omni argues that the Supreme Court of Virginia should have applied the rule differently to

conclude that the County's purchase of Doves Overlook was not "foreseeable" because it was allegedly "illegal and meritless."[23] Pet. 18-20. Omni's argument, being one of mere misapplication of a properly-stated rule, does not merit the exercise of this Court's discretionary jurisdiction pursuant to Rule 10. Alternatively, it is only an argument that the Supreme Court of Virginia's decision is erroneous, which is also not a basis upon which this Court grants a writ of certiorari. *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974).

II.

THE SUPREME COURT OF VIRGINIA'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR THOSE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Rule 10 states conflict with the decision of this Court or a decision of a United States court of appeals as a basis upon which a petition for certiorari may be granted. The

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[23] Omni does not address the Supreme Court of Virginia's finding that the purchase, whether "foreseeable" or not, did not impose the risk that Omni might not secure the needed access, "did not change the requirements for R-10 development, and did not interfere with or frustrate any enforceable arrangement or right Omni had regarding road or utility access." A-46, (253 Va. at 70, 481 S.E.2d at 466). Omni also does not address the failure of it to challenge, and the Courts below to address, the validity of the purchase of the Doves Overlook property pursuant to Va. Code Ann. § 15.1-262 (*See,* footnote 18) and the resulting jurisdictional defect to consideration of such a claim now. *See* pp. 13-15, herein.

failure of Omni to prove that County regulation deprived it of *even one* land use interest in the fee of Doves Landing reconciles the Supreme Court of Virginia's opinion with those upon which Omni attempts to base its conflict claim. Both this Court and the United States Court of Appeals for the Federal Circuit (the "Federal Circuit") have stressed that a proscribed land use interest must be inherent in the title itself before it can be said to have been taken by regulation. Thus, the Supreme Court of Virginia's decision (denying Omni compensation for deprivation of a non-existent land use) is *not* in conflict with this Court of the United States Court of Appeals for the Federal Circuit.

A. OMNI'S PETITION DOES NOT STATE A CONFLICT BETWEEN THE OPINION BELOW AND THE DECISIONS OF THIS COURT.

Omni asserts that the Supreme Court of Virginia 's decision is in conflict with this Court's decisions in *Nollan v. California Coastal Commission*[24] and *Agins v. City of Tiburon.*[25] Omni's contention is without merit. First, it ignores crucial analytical distinctions between *Nollan* and *Agins* and the instant decision. Second, it obfuscates a critical and basic distinction: that the landowners in *Agins* and *Nollan* actually possessed the proscribed land use interest as a stick in their respective bundles of rights. Unlike Omni, therefore, they were able to benefit from those uses but for the challenged regulation.

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[24] 483 U.S. 825 (1987).

[25] 447 U.S. 255 (1979).

1. *AGINS* AND *NOLLAN* ARE ANALYTICALLY DISTINCT FROM THE DECISION BELOW

On page 8 of its Petition, Omni focuses on the Supreme Court of Virginia's statement that it was:

> unnecessary to consider the *third criterion*, the character of the County's action, because regardless of the legality or merit of the County's action, Omni did not establish a regulatory taking of Omni's property under the Fifth Amendment.

A-47 through A-48[26] (253 Va. at 71, 481 S.E.2d at 466-67) (emphasis added). Omni omits the words "third criterion" from its quotation of this passage. *See* Pet 8. In so doing, Omni also omits the context in which the Virginia high court spoke. The Supreme Court of Virginia was applying the "traditional three-part test"[27] for determining a regulatory

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[26] Omni incorrectly cites the Appendix at A-46. This quotation actually appears at the bottom A-47 to the top of A-48.

[27] A-41. The Supreme Court of Virginia referred to the traditional, ad hoc analysis, elaborated on by this Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). Although sometimes referred to as a "test", both the Supreme Court of Virginia and the trial court correctly noted that there is no requirement that each prong of this analysis be applied in every case. A-26; A-47, 253 Va. at 71, 481 S.E.2d at 466, *citing Lucas,* 505 U.S. at 1071; Hodel v. Irving, 481 U.S. 704 (1987). Thus, precedent of this Court did not require the Supreme Court of Virginia to apply the third

taking. This is a test *which neither Agins nor Nollan applied.* Furthermore, it is an analysis that is distinct from the categorical, "legitimate state interest" analysis employed by this Court in *Agins* and *Nollan.*[28] Therefore, *Agins* and *Nollan* cannot serve as a basis for conflict with the Supreme Court of Virginia's decision not to address the "character prong" of the ad-hoc regulatory taking analysis.

2. *AGINS* AND *NOLLAN* CONCERNED LANDOWNERS WHO POSSESSED THE LAND USE INTEREST AT ISSUE AS A STICK IN THEIR BUNDLES OF RIGHTS

Agins and *Nollan* are, furthermore, easily distinguished from the instant case. Both involved cases where government regulation actually deprived the landowners of a land use interest existing within the fee of their properties. In *Agins*, the owners were deprived of the right they would otherwise have to develop a higher density than what the government regulation permitted. Unlike Omni,

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prong (character of the governmental regulation) after finding that Omni's claim did not satisfy the first two prongs. *See Hodel* 481 U.S. at 714.

[28] *Agins* and *Nollan* form the second sort of categorical regulatory taking to which this Court referred in *Lucas*: "where the land use regulation 'does not substantially advance legitimate state interests." *Lucas*, 505 U.S. at 1016, *citing Agins*, 447 U.S. at 260. Omni did not argue, and the lower courts did not address, this second categorical regulatory taking theory. Therefore, this Court would not have jurisdiction to entertain that theory now. *See* p. 13, herein.

the Agins' realization of that higher density was not dependent upon the good graces of a neighbor.

In *Nollan*, the landowners were required to grant to the public an easement through their beachfront property as a condition to building a house on the property. Omni, on the other hand, was not deprived of any property right. As noted by the Supreme Court of Virginia when discussing "damage" under the Constitution of Virginia:

> Omni has not lost the right to develop its property. The R-10 density classification had not been altered . . . Omni had not acquired the rights necessary to realize its preferred method of development either as a matter of contract or easement.

A-49 (253 Va. at 72, 481 S.E.2d at 467).

It was only because government regulation actually deprived the landowners in *Agins* and *Nollan* of property under the Fifth Amendment that this Court went on examine whether the legitimate state interest was furthered by the taking. This is because governmental conduct, whatever its nature, cannot violate the Just Compensation Clause if it takes no property. Omni's failure to prove that governmental regulation deprived it of property renders *Agins* and *Nollan* inapposite to the decision below.

3. THE ANALYSIS BELOW IS CONSISTENT WITH THIS COURT'S RULINGS DISMISSING TAKINGS CLAIMS WHERE THE LANDOWNER DID NOT POSSESS THE PROPERTY RIGHT ASSERTED

The Supreme Court of Virginia's analysis, furthermore, is consistent with the decisions of this Court dismissing takings claims because the challenged governmental action did not deprive the claimant of property.[29] *See e.g. U.S. v. Willow River Power Co.*, 324 U.S. 499 (1945). In *Willow River*, the claimant power company claimed a taking based on the lowering of the water level of the St. Croix River and the consequent loss of its power head. This Court, like Supreme Court of Virginia in the instant case, had no occasion to examine the character of the governmental conduct. This Court only reached the issue of whether the power company had a property right to the high-water level in the first place:

> We hold that claimant's interest or advantage in the high-water level of the St. Croix River as a run-off for tail waters to maintain its power head is not a right protected by law and that the award below based exclusively on loss in value thereof must be reversed.

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[29] This Court has long held that compensable property rights are not created by federal courts, but by existing rules and understandings stemming from an independent source such as state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

See also United States v. Chandler-Dubar Water Power Co., 229 U.S. 53 (1913) (no property interest can exist in navigable waters). This Court reaffirmed the definitive nature of the property right question in *Penn Central, supra.*, from which the so-called "ad hoc" analysis sprung. *See Penn Central*, 438 U.S. at 124-125, *citing Willow River* and *Chandler-Dubar*. More recently, in the *Lucas* opinion, this Court reaffirmed that no compensation is due under the Fifth Amendment, even where all economically beneficial use is destroyed by regulation, "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027.

Consistent with these precedents, the Supreme Court of Virginia properly focused on the definitive issue of what rights Omni possessed in its fee:

> Omni's gamble here went beyond merely securing road and utility access. Omni's proposed development depended on such access coming through Doves Overlook. There was no assurance that such access would be available. *Omni's ownership of Doves Landing did not carry with it any right or assurance that Omni could utilize access through Doves Overlook. There were no easements or contracts giving Omni road or utility access through or with Doves Overlook.*

A-44 through A-46 (253 Va. at 69, 481 S.E.2d at 465). (emphasis added). Under the precedents set forth above, this conclusion rendered it unnecessary to address the character of the County's regulatory conduct. Therefore, Omni's claim

that the opinion below is inconsistent with the rulings of this Court is without merit. Indeed, the Virginia high court's opinion falls squarely within this Court's precedents holding that the governmental purchase of a parcel does not amount to a taking of abutting property even though it might affect the beneficial use to which that abutting property can be put. *See Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932).

B. THE SUPREME COURT OF VIRGINIA'S OPINION DOES NOT CONFLICT WITH DECISIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

The definitive property issue also reconciles the opinion below with the cases cited by Omni from the Federal Circuit Court. In both *Loveladies Harbor, Inc. v. U.S.*[30] and *Florida Rock Industries, Inc. v. U.S.*[31] the Federal Circuit addressed claims by owners who actually possessed, within their fees, the common law right to mine limestone but for denial of the governmental permit. In neither case was exploitation of the right dependent upon beneficence of an adjoining property owner. The "owners' basis or investment"[32] in the properties was in pursuit of a right existing in their respective titles by virtue of common law Indeed, Florida Rock Industries had already commenced mining operations on its property when the U.S. government

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[30] 28 F.3d 1171 (1994).

[31] 18 F.3d 1560 (1994).

[32] *See* Pet 13, citing *Florida Rock*, 18 F.3d at 1567.

issued a cease and desist order. *See Florida Rock*, 18 F.3d at 1562. In addressing Chief Judge Nie's dissenting opinion, the majority was careful to note that it was this common law right, and not just value, that was being taken. *See id* 18 F.3d at 1572.

Conversely, Omni's investment or basis in its preferred method of developing Doves Landing was based on nothing more than "a risk of development".[33] A-44 through A-45 (253 Va. at 69, 481 S.E.2d at 465). The Supreme Court of Virginia actually *followed* the Federal Circuit's holdings that compensation is not due for such a diminution in value because:

> One who buys with knowledge of a restraint must assume the risk of economic loss. . . . A party may not undertake a calculated business risk and then seek reimbursement from the Government when the party's gamble does not result in its favor.

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[33] A-44 through A-45 (253 Va. at 69, 481 S.E.2d at 465). Not only was Omni's basis or investment unsecured by a property right it owned, but the evidence failed to show that Omni spent *any* of that basis *even attempting* to secure the access upon which its preferred method of development was premised. The Supreme Court of Virginia expressly recognized this oddity in its decision. A-45 (253 Va. at 69-70, 481 S.E.2d at 465). As stated above, admissions at trial also established that Omni never even *asked* for these rights from the time the County became the owner of Doves Overlook. *See* p. 12, *supra.*

Id., citing Loveladies, 28 F.3d at 1177, *Crepple v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994); *Altas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704, 708 (1995). (internal citations omitted).

The Federal Circuit has, moreover, been careful to endorse the definitive property right analysis followed by this Court and the Supreme Court of Virginia below. In *M & J Coal v. United States*,[34] a mining company had acquired the right to mine coal through various severance deeds. The U.S. Department of Interior issued an order that the company cease certain dangerous mining practices. M & J alleged a taking. The Federal Circuit stressed that:

> precedent indicates a "two-tiered" approach in analyzing a takings claim involving governmental action that result in land use restriction. First a court should inquire into the nature of the land owner's estate to determine whether the use interest was part of the owner's title to begin with, *i.e.* whether the land use interest was a 'stick in the bundle of property rights acquired by the owner. *Lucas*, U.S. at ___, 112 S. Ct. at 2899. Second, if the claimant can establish the existence of such an interest, the court must determine whether the government action at issue constituted a compensable taking of that "stick".

47 F.3d at 1153-54. Employing this analysis, the Federal Circuit held that the coal company's "acquisition of mining rights by deed did not give it the right to mine in such a way to endanger the public health and safety." *Id.* Significantly, this finding rendered it unnecessary for the court to proceed with

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[34] 47 F.3d 1148 (Fed Cir. 1995).

the "second tier" in the analysis, *viz*, whether governmental action took such a right.

The Federal Circuit has complied with this two-tier analysis since *M & J*. In *Avenal v. United States*,[35] for example, the Federal Circuit first addressed the question of whether Louisiana law recognized, as property, leases for water bottom lands for oyster propagation *before* moving on to decide whether that property had been taken by conduct "that reduced the value of Plaintiff's property well beyond the level of 'mere' diminution". 100 F.3d at 937 *citing Florida Rock* 18 F. 3d at 1570. The Federal Circuit was obliged to find that:

> [t]he question, then is not whether the Plaintiffs had a constitutionally protected property interest that was taken by the Government. The leasehold estates owned by the Plaintiffs entitled them to use the beds of the Basin for the cultivation of oysters. *Id.* 936-37.

The Federal Circuit's continued adherence to the "two-tier approach" set down by this Court removes any conflict with the opinion below denying Omni compensation for the loss of a property right it never possessed.

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[35] 100 F.3d 933 (Fed. Cir. 1996).

III.

THE PETITION DOES NOT RAISE AN IMPORTANT FEDERAL QUESTION

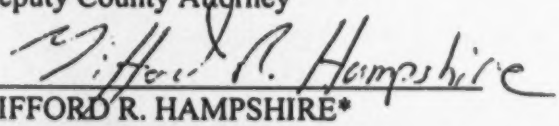
As stated at footnote 19, this Court has consistently rejected the notion that there is such a thing as a " regulatory partial taking". *See Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978); *Concrete Pipe and Products of California Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602 (1993). Therefore, Omni's Petition does not raise an important undecided federal question. For this additional reason, the Petition does not raise a basis for the exercise of this Court's discretionary jurisdiction under Rule 10.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SHARON E. PANDAK
County Attorney
STEPHEN A. MacISAAC
Deputy County Attorney



GIFFORD R. HAMPSHIRE*
Assistant County Attorney
*Counsel of Record for Respondent
1 County Complex Court
Prince William, Virginia 22192
(703) 792-6620

Record No. 96-1878

In The
SUPREME COURT OF THE UNITED STATES

October Term 1996

OMNI HOMES, INC.
Petitioner,

vs.

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA
Respondent.

CERTIFICATE OF SERVICE

I, Gifford R. Hampshire, a member of the Bar of this court, hereby certify that on this 26th day of June, 1997, three copies of this Brief in opposition in the above-entitled case were mailed, first class mail to: to Mark A. Moorstein, Esq. and James A. Yergin, Esq.; Mark A. Moorstein, P.C. 10500 Battleview Parkway, Suite 210, Manassas, Virginia 22110, Counsel for Petitioner. (703) 361-6500. All parties required to be served have been served.

GIFFORD R. HAMPSHIRE
Assistant County Attorney
1 County Complex Court
Prince William, Virginia 22192-9201
(703) 792-6620
Counsel of Record for Respondent